August 11, 2015 CEQA Guidelines Discussion Draft

City of Roseville Comments

Section 15064

The substance or intent of these changes is helpful, explicitly stating what has long been practiced and established through case law: a lead agency may rely on a threshold and the threshold can be from an environmental standard. The City has three concerns with the proposed language:

1. "When relying on a threshold a lead agency should explain . . .". Suggest adding the word "briefly" before the word explain, or otherwise adding language making it clear that the explanation need not be exhaustive.

2. "An agency shall not apply a threshold in a way that forecloses consideration of substantial evidence . . .". The explanation provided for this language is that "the third sentence cautions that a lead agency must evaluate any substantial evidence supporting a fair argument that, despite compliance with thresholds, the project's impacts are nevertheless significant." This misapplies the fair argument standard. "Fair argument" is the deciding factor only when determining *what type* of document to produce. Once a decision to prepare an EIR is made, the substantial evidence standard applies, irrespective of the fair argument standard. Thus, in an EIR, if the lead agency makes a fair argument relying on substantial evidence supporting the lead agency conclusion, that conclusion is valid even if a fair argument could be made to the contrary. See Citizens of Goleta Valley v. Board of Supervisors (1988) 197 Cal.App.3d 1167, 1177. Also see Section 15384 of the CEQA Guidelines, which defines substantial evidence (in part) as enough information that "a fair argument can be made to support the conclusion, even though other conclusions might also be reached."

   Under the circumstances, the City is concerned about the language being added to the Guidelines. This must be drafted in a manner that does not conflict with Section 15384 and established case law. In preparing an EIR, a lead agency may in fact decline to consider a contrary conclusion supported by substantial evidence, so long as the position it has chosen is also supported by substantial evidence. Nor need the lead agency discuss and dismiss all other contrary arguments; again, it need only support the argument it has made. We suggest revising the section to state an agency's affirmative obligations, rather than state it in terms of what may not be done, as below:

   (2) Thresholds of significance, as defined in Section 15064.7(a), may assist lead agencies in determining the significance of an impact. When relying on a threshold, the lead agency should briefly explain how compliance with the threshold indicates that the project's impacts are less than significant, and provide substantial evidence in support of its conclusions. ~~A lead agency shall not apply a threshold in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, there may still be a significant environmental effect from a project.~~

3. "An 'environmental standard' is a rule of general application that is adopted . . .". It is unclear why the section is being limited to acknowledge only those environmental standards which are rules of general application. CEQA Guidelines Section 15064 grants agencies the discretion to develop their own thresholds of significance, and only requires formal adoption of those thresholds in cases where they are intended for general rather than specific use. Case law has established (Save Cuyama Valley v. County of Santa Barbara (2013)) that a lead agency may develop and use a project-specific threshold without needing a formal adoption process, so long as the threshold and analysis is supported by substantial evidence. It seems that if the Guidelines are to be amended to recognize that a lead agency may rely on environmental standards, it should also be made clear the standards can be of general application *or* project-specific.

Section 15168 Program EIR

"Relevant factors that an agency may consider include, but are not limited to . . .". Experience suggests that it is risky to stipulate specific factors in this way, for a multitude of reasons. To list certain factors seems to presuppose their importance in the process, or otherwise indicate that these are minimum factors that *should* be taken into account, rather than merely examples. Moreover, the listed items have less to do with the issue addressed by the Section—whether a project's *impacts* fall within the scope of a program EIR—and more to do with whether the project itself has changed. Thus, the section creates an implication that changes *in and of themselves* warrant consideration, rather than the effect of those changes on the environment. The City recommends deleting the final sentence, as it creates concern/confusion and it is unnecessary to provide examples; the prior sentence speaks for itself.

Appendix G

The City supports the intent to reorganize Appendix G to promote logical grouping and clarify certain items. These comments seek to assist in that regard. While some of the changes succeed at their intent, many others would result in analysis fragmentation if an environmental document were to follow the Checklist organization. Essentially, we wish to avoid separating out impact topics in a way which, if the organization were mirrored in an environmental document, would separate related analyses from each other and make it more difficult for the reader to understand the full scope of related project impacts. We make this point at the outset because many of our concerns about the Checklist changes are organizational.

Aesthetics. As noted, visual analyses have become more and more challenging, as it involves a high degree of subjectivity in a process intended to discuss and disclose facts. Revising the guidelines to specify codes and standards against which an impact should be assessed is very helpful, but unfortunately overlooks key issues which case law will demand be examined. In an urbanized setting, the "Updated Considerations" (page 40 of the discussion draft) rationale works and relies on a court case which also dealt with an urbanized setting. But how would zoning or other regulations prevent a new shopping mall—however beautifully designed—from resulting in a significant impact if it is being placed at the edge of urbanization surrounded by thousands of acres of open space? Such projects happen routinely in developing Cities as they expand their boundaries, and the court would be unlikely to find that the impact to existing views of the natural landscape is less than significant just because the new buildings blocking those views will be well-designed. This topic is a challenge, and unfortunately we do not have a solution to replace the troubling language.

Air Quality. There are concerns about the language "established by an applicable air quality management or air pollution control district." Firstly, it seems that the language should be changed from "established" to "adopted," given that these are rules of general application. Also, how is "applicable" defined? It could be defined by jurisdiction; that a project within the boundaries of a certain District must use the significance criteria of that District. CEQA establishes that the lead agency ultimately has discretion to determine the thresholds against which significance will be determined, as supported by substantial evidence. This section would seem to remove that discretion, requiring a lead agency to use the thresholds of the local District. However, there are cases in which a local District threshold may be absent, deemed inadequate or not adopted with the appropriate CEQA review and threshold justification. As an example, many jurisdictions found themselves relying on the thresholds of a non-local District or developing their own thresholds when it came to greenhouse gases, because some Districts were not as quick to develop thresholds or analysis standards. Please consider reframing the sentence to reference the applicable criteria rather than the applicable District, as follows: "exceed applicable adopted significance criteria established by an ~~the~~ ~~applicable~~ air quality management or air pollution control district." This change would allow a lead agency to defend the applicability of the selected *criteria* with substantial evidence, rather than seeming to frame the question as a prescriptive determination of District jurisdiction.

Energy. All of the checklist questions except the new V. b) are phrased in the negative (i.e. conflict with, violate, cause a substantial impact) and a "yes" or "no" answer to the question suggests a conclusion about the potential level of significance. What does a "yes" or "no" answer to the question of whether a project "incorporate[s] renewable energy or energy efficiency" imply about significant impacts? There seems to be no direct correlation, as there is for all other checklist questions. Item V. a) seems sufficient to reach the point of this section; item b) is confusing and not directly related to any significance conclusion, and should be deleted.

Hazards and Hazardous Materials. It is not clear why a noise item is being added to the Hazards and Hazardous Materials section. The average person is likely to look in the Noise section to find a determination regarding airport noise; the Hazards and Hazardous Materials section is not logical placement for this item. Also, that placement implies that airport noise impacts are "hazardous," when noise standards established in Airport Land Use Compatibility Plans are based on the much lower nuisance-level noise volumes. That said, having some airport-related items in Hazards and others in Noise is not ideal, but perhaps the solution is not to place a Noise item into Hazards, but instead to add an Airports/Aviation section to the checklist and include all airport items there. In fact, many EIRs include such a chapter, because the average reader does not expect to find airport-related discussion within the Hazards chapter at all.

In addition, flooding impacts are now being split between multiple sections. In Hazards, the question of whether the project will expose people to flooding is answered, in Hydrology the question is asked whether the project will cause flooding or redirect flood flows, and in Open Space (which is an odd placement) the question is asks whether housing will be placed in an area subject to periodic inundation. Either all flooding-related questions should be moved into the Hazards section, or all flooding-related items should be left within the Hydrology section. It is confusing to separate them, particularly because then the associated environmental document discussions—if they follow this formatting—will need to be split up. Furthermore, the setting, background, and technical studies needed to describe and define flooding impacts are largely the same as those needed to discuss topics like hydromodification and other run-off issues. This means that there will be a great deal of duplication within the Hazards and Hydrology chapters of an EIR, if we follow the Checklist organization.

Overall, we would recommend taking this as an opportunity to restructure this section. It would be useful to have Hazards be a separate section from Hazardous Materials. There is no overlap between the subject matter, and hazardous materials is a very specialized area of analysis that often requires a great deal of background; it is often given its own EIR chapter. This would allow the Hazards section to be restructured with subsections addressing specific topics: geological hazards (earthquakes, unstable soils), wildfire, hydrologic hazards (if flooding is grouped here), and aviation (if airports are grouped here).

Land Use and Planning. It is unclear why the word "applicable" is being deleted. No explanation has been provided, and it is inconsistent with Section 15125(d), the section on which the checklist question is based. Clearly, an analysis should be confined to those land use plans which actually apply to the project in question; this word should not be deleted.

Open Space, Managed Resources, and Working Landscapes. As currently organized, this major heading contains impact topics as dissimilar as wetlands, unique geological features, fires, and inundation by tsunami. The explanation given is that the section was organized to follow how the Open Space Element of a General Plan is organized, on the grounds that this would be easier for jurisdictions. However, this is not actually helpful, so we urge you to reconsider this organization, and think in terms of environmental analysis rather than General Plan Elements. Our concerns are outline below.

Landscapes Section a) we concur that an examination of paleontological resources should in some manner be separated from considerations of tribal or historical resources, as these items are not remotely related. However, it is also not remotely related to the topics of habitat preservation and wetlands. We suggest retaining paleontological resources within Cultural Resources but including

subheadings to make tribal resources, historic resources, and paleontological/geological resources separate subsections. Also, based on the primary "would the project adversely affect open spaces containing" question, this seems to suggest that impacts to paleontological resources and unique geological features are only an issue when those resources/features are found within open space. It is also unclear why an effort is being made to target only impacts to wildlife habitat and impacts to waters of the state out of all the potential open-space-related impacts to biological resources.

Landscapes Section b) There is sense in combining the sections regarding agricultural resources, mineral resources, and soil resources, as there is a great deal of overlap in the background and analysis portions of the respective analyses. Combining these into the same overarching section brings together related analyses for the benefit of the reader, and could reduce overall page length and duplication in an EIR. While there is no overlap in background, there is also sense in including forestry resources in the new category of managed resources, as it fits best there. There are organizational concerns related to including oak woodlands and groundwater recharge with these topics, as they are entirely unrelated and fit better elsewhere. Unlike the other items in this section, oak woodlands are not a managed or working landscape; they are a habitat, typically addressed within the biological resources section alongside discussions of Habitat Conservation Plans or policies for the protection of biological resources. Separating this item from those discussions/analyses does not make organizational sense. Similarly, while groundwater can in some sense be considered a managed resource, it does not make organizational sense to separate it from discussions of hydrology and water quality, as the topic shares background discussion and analysis with other items in this chapter. In addition, the average reader is unlikely to look for groundwater impacts in a section called Open Space, Managed Resources, and Working Landscapes.

Landscapes Section c) This appears to fit the new category well, but we would recommend changing the language to avoid overlap with the Public Services portion of the checklist. Public Services already addresses impacts related to the provision of parks. Landscapes Section c should focus specifically on open space recreation resources, as opposed to active-use neighborhood and community parks. As written, the language of the two sections are not clearly distinct, and may result in duplication of some portions of analysis in both sections. For instance, the language could be changed as below:

> "c) Adversely affect existing or planned recreational facilities (e.g. trails, interpretive areas, etc) within designated or planned open space through conversion to non-recreational use or by increasing demand to a degree that substantial physical deterioration would occur?"

Landscapes Section d) It is unclear why a list of hazard items has been placed within the Open Space section, particularly inasmuch as they repeat items already found elsewhere in the Checklist. These items do not appear to fit at all with the major section heading. Included are an inundation item, a wildfire item, and an unstable soils item, even though these topics are already found in the Hazards, Wildfire, or Hydrology sections. Lastly, it simply doesn't fit to call an area "required for the protection of water quality and water supply" an "area requiring special management due to hazards." Overall, this section needs to be deleted and the items rehoused in the proper locations. In fact, we encourage restructuring the Hazards and Hazardous Materials section to better accommodate these items (excluding groundwater), as indicated in comments on that section.

Population and Housing. These particular checklist items have always been lacking, as the questions are not tied to actual impacts. That is, the question should not be whether replacement housing is needed, it is whether that replacement housing will cause substantial adverse impacts. Each of these questions should be amended to include some version of the phrase "Would the project result in substantial adverse physical impacts associated with . . .".

Transportation. We have the same comment on Item a) as on land use plans: the word "applicable" should not be deleted. Otherwise, the consolidation of language here is useful. There are concerns about item c), as it is unclear how the authors expect this to be evaluated. How is "additional automobile travel" to be measured? By VMT (which has already been asked), number of trips, amount of time spent making trips, or . . . ? In addition, the question is not a measure of system performance; it

seems to be more of an air quality question. If so, then this question should be moved to Air Quality, and should also be reframed to ask whether the improvement will cause substantial adverse air quality impacts. One concern is that the question targets increases in "travel," which cannot be used as a placeholder for air quality impacts when looking at a congested area. Excessive congestion causes significant air quality impacts associated with carbon monoxide, increases travel times, and often causes vehicles to choose alternative routes which are longer than the congested route. Thus, the measure of effectiveness of any particular roadway improvement should be whether it worsens or improves environmental impacts of concern, not whether it induces "travel."

Page 105, Public Review of Draft EIR. The Discussion Draft explains that this change is so that the lead agency "may specify the manner in which it will receive comments." However, the text *requires* the lead agency to specify. Also, until reading the explanation text, the section was confusing. It was unclear whether the text requires a lead agency to specify at least one means by which comments may be submitted or if it was more specifically directing that *all* allowable means of commenting must be specified.

Page 143, Discretionary Project. The added text should be revised to read "any of the concerns which might be raised in an environmental impact report, mitigated negative declaration, or negative declaration." Otherwise, this added text will only apply to project which may have significant environmental effects. The degree of environmental effect is used to determine the type of environmental document, not to determine whether a project is subject to CEQA at all.